

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

R.H. Donnelly, Inc., d/b/a Dex One)	
as agent for Illinois Bell Telephone Company:)	
)	ICC Docket No. 11-0668
Petition for Variance from Section 735.180)	
of the Illinois Administrative Code)	

INITIAL BRIEF OF THE
STAFF OF THE ILLINOIS COMMERCE COMMISSION

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The Staff of the Illinois Commerce Commission (the "Staff"), by and through its counsel, and pursuant to Section 200.800 of the Commission's Rules of Practice (83 Ill. Adm. Code 200.800), respectfully submits its Initial Brief in the above-captioned matter.

I. Statement of the Case

On September 30, 2011, R.H. Donnelly, Inc., d/b/a Dex One (hereafter "RHD"), in its capacity as agent for Illinois Bell Telephone Company, filed its Petition for Variance and Expedited Relief, initiating this proceeding. See, *generally*, Petition. Through its Petition, RHD seeks authority to discontinue inclusion of residential telephone listings, otherwise known as "White Pages", in its so-called "Neighborhood Directories" within the City of Chicago. Petition, ¶4. RHD would cease the saturation delivery (delivery to all residences) of the Neighborhood Directories, although it would continue to deliver city-wide Yellow Pages, which would include government and emergency listings. Id. In the Illinois Bell service territory outside the City of Chicago, RHD seeks authority to discontinue the saturation delivery of residential White Pages in "certain markets", while continuing to deliver Yellow Pages, which would include government and emergency listings. Id., ¶5. In either case, customers could, upon request, receive up to five White Pages directories free of charge. Id., ¶¶4, 5. RHD contemporaneously submitted the Direct Testimony of David Davidson to its Petition. See RHD Ex. 1.0. Thereafter, on October 5, 2011, RHD submitted a supplement to Mr. Davidson's testimony. See RHD Ex. 1.1 – 1.4.

On October 13, 2011, the Staff filed its Request for Investigation. See Request for Investigation. On October 25, 2011, the Commission voted to authorize such an investigation. See Notice of Commission Action (October 26, 2011).

In the interim, on October 17, 2011, a pre-hearing conference was convened before a duly-appointed Administrative Law Judge (ALJ). Tr. at 3-6. On November 30, 2012, the Staff filed the Direct Testimony of Joan Howard. See Staff Ex. 1.0. On December 21, RHD submitted the Responsive Testimony of Mr. Davidson. See RHD Ex. 2.0. Thereafter, on April 18, 2012, the Staff submitted the Rebuttal Testimony of Ms. Howard.¹ See Staff Ex. 2.0. RHD filed the Surrebuttal Testimony of Mr. Davidson on April 20, 2012. See RHD Ex. 3.0. ON May 1, 2012, and evidentiary hearing was convened, in the course of which testimony was taken and evidence otherwise adduced, and a briefing schedule set. Tr. at [not yet available].

II. Preliminary Legal Matters

A. Burden of Proof

Where a statute does not specifically place any burden of proof, courts have uniformly imposed on administrative agencies the common-law rule that the party seeking relief has the burden of proof. Scott v. Dept. of Commerce and Community Affairs, 84 Ill. 2d 42, 53; 416 N.E.2d 1082, 1088; 1981 Ill. Lexis 229 at 14; 48 Ill. Dec. 560 (1981). The term “burden of proof” includes the burden of

¹ The Staff filed a revised version of Ms. Howard’s Rebuttal Testimony on May 16, 2012, having received leave to do so at the May 1, 2012 hearing. Tr. at [not yet available]. Ms. Howard’s Revised Rebuttal Testimony is marked as Staff Ex. 2.0R. The only difference between Staff Ex. 2.0 and 2.0R is that the latter corrects pagination errors in the former.

going forward with the evidence, and the burden of persuading the trier of fact. People v. Ziltz, 98 Ill. 2d 38, 43; 455 N.E.2d 70, 72; 1983 Ill. Lexis 453 at 6; 74 Ill. Dec. 40 (1983). The burden of persuading the trier of fact does not shift throughout the proceeding, but remains with the party seeking relief. Ambrose v. Thornton Twp. School Trustees, 274 Ill. App. 3d 676, 680; 654 N.E.2d 545, 548; 1995 Ill. App. Lexis 614 at 7-8; 211 Ill. Dec. 83 (1st Dist 1995), *app. den.*, 164 Ill. 2d 557 (1995). Accordingly, RHD has the burden of proof.

B. Standard of Proof

Section 10-15 of the Illinois Administrative Procedure Act provides that “[u]nless otherwise provided by law or stated in the agency's rules, the standard of proof in any contested case hearing conducted under this Act by an agency shall be the preponderance of the evidence.” 5 ILCS 100/10-15. The Commission has observed that the Administrative Procedure Act standard appears to be: “the appropriate standard in all contested cases[.]” *Order at 4, Illinois Commerce Commission on its Own Motion: Amendment of 83 Ill. Admin. Code Part 200*, ICC Docket No. 92-0024 (April 29, 1992). Consequently, the standard of proof in this case is the preponderance of the evidence standard.

III. Applicable Statute and Regulations

Section 13-513 of the Public Utilities Act provides that:

A telecommunications carrier may petition for waiver of the application of a rule issued pursuant to this Act. The burden of proof in establishing the right to a waiver shall be upon the petitioner. The petition shall include a demonstration that the waiver would not harm consumers and would not impede the development

or operation of a competitive market. Upon such demonstration, the Commission may waive the application of a rule, but not the application of a provision of this Act. The Commission may conduct an investigation of the petition on its own motion or at the request of a potentially affected person. If no investigation is conducted, the waiver shall be deemed granted 30 days after the petition is filed.

220 ILCS 5/13-513

Section 735.180 of the Commission's Rules, entitled "Directories", provides, in relevant part, that:

- a)
 - 1) Primary telephone directories of all exchanges shall be revised, printed and distributed to customers at least once each year. Each directory shall list the name, address and telephone number of all customers, except public telephones. At the customer's request, that customer's listing or a portion of that listing, may be omitted. A company may charge for listing additional names for each main station on separate directory lines.

...

- d) Upon issuance, one copy of each directory shall be distributed to each customer served by that directory and two copies of each directory shall be furnished to the Commission.

...

83 Ill. Adm. Code 200.180(a)(1), (d)

Section 735.50 of the Commission's Rules, entitled "Variance", provides that:

The Commission, on application of a company, customer, applicant, or user or on its own motion, may grant a temporary or permanent variance from this Part in individual cases where the Commission finds that:

- a) The provision from which the variance is granted is not statutorily mandated;

- b) No party will be injured by the granting of the variance; and
- c) The rule from which the variance is granted would, in the particular case, be unreasonable or unnecessarily burdensome.

83 Ill. Adm. Code 735.50

IV. Argument

In the Staff's view, Commission should decline to grant the requested waiver. RHD has failed to meet its burden of demonstrating that customers will not be harmed, and in fact the likelihood is that they will be if it is. Moreover, RHD has already sought, and the Commission has already granted, a waiver of saturation delivery of Chicago city-wide White Pages. *See, generally*, Order, R.H. Donnelly: Petition for Variance from Section 735.180 of the Illinois Administrative Code, ICC Docket No. 07-0434 (October 24, 2007); Amendatory Order, R.H. Donnelly: Petition for Variance from Section 735.180 of the Illinois Administrative Code, ICC Docket No. 07-0434 (July 8, 2009). In those orders, discussed more fully below, the Commission authorized RHD to publish and distribute, within the City of Chicago, a so-called "Neighborhood Directory" consisting of both Yellow Pages and White Pages listings for each city neighborhood. Order at 4. RHD has failed to demonstrate that a waiver of this modest requirement is warranted.

In the event that the Commission elects to grant the requested waiver – which the Staff does not recommend – the Staff urges the Commission to do so only subject to the following conditions:

- RHD should be required to conduct a general survey of customers within the service territory covered by each directory to determine whether consumers wish to continue to receive residential white pages as part of at least one directory distributed annually. Staff suggests a survey could be conducted using a return postage paid card included with the core directory distributed prior to RHD's intention to eliminate white pages in a specific area. The postage card would be provided in a conspicuous manner to help ensure maximum response by directory recipients. Since RHD chooses saturation distribution, the survey should be made of all recipients of the core directory. RHD would present the results of the survey when providing prior notice (120 days) to the Commission of its intent to eliminate residential white pages in a specific directory.
- The Illinois Bell Telephone Company ("AT&T Illinois") should be required to ask new customers at the time of application whether they wish to receive a directory containing residential white pages.
- The conditions imposed by the Commission in Docket No. 07-0434 should remain in effect.

At the risk of stating facts which may be well-known and obvious, a certain amount of background information might be warranted at this juncture. The White Pages, or "the phone book", is an alphabetical listing of telephone subscribers in an exchange, along with their telephone numbers and their addresses as required by Section 735.180. Staff Ex. 1.0 at 3. Although customers may elect not to have their number listed, this requires an affirmative election and incurs an additional charge. Id. The White Pages includes primarily residential listings. Id. In contrast, Yellow Pages listings are organized by business type (e.g., hardware stores, restaurants, electronics stores) rather than alphabetically by business subscriber and are normally printed on yellow paper. Id. There is no regulatory requirement that a carrier revise, print, and distribute Yellow Pages directories. Id. The Yellow Pages is a for-profit enterprise; the

publisher sells advertising space in the Yellow Pages to businesses interested in appearing in the Yellow Pages directory. *Id.* RHD is not the only company that distributes a directory similar to the Yellow Pages. *Tr.* at [not yet available]. There is a publication called the “Yellow Book”, which is substantially similar to the RHD Yellow Pages. *Id.*

RHD acquired the regulatory obligation to publish the White Pages as follows: on September 1, 2004, RHD purchased the interest of AT&T Illinois in an RHD - AT&T Illinois partnership that published AT&T Illinois’ Yellow Pages and White Pages directories in Illinois and Northwest Indiana. *Staff Ex. 1.0* at 1. On the same date, RHD entered into a 50-year directory services license agreement with AT&T Illinois to publish AT&T Illinois’ Yellow Pages and White Pages directories in Illinois. *Id.* at 1-2. The agreement characterizes RHD as the agent of AT&T Illinois for the purpose of publishing White Pages directories. *Id.* at 2. RHD is contractually obligated to comply with all of AT&T Illinois’ legal obligations related to directories, including the applicable regulations of the Commission. *Id.* In effect, RHD discharges AT&T Illinois’ legal obligations to provide directories in Illinois². *Id.*

In its Order and Amendatory Order in Docket No. 07-0434, *op.cit.*, the Commission granted RHD permission to substitute distribution of neighborhood White Pages directories for distribution of the Chicago city-wide residential White Pages; prior to that, RHD was required to print and distribute a directory containing city-wide listings. *Staff Ex. 1.0* at 4. The variance exempted RHD from

² Staff was unable to ascertain whether the Commission approved this transaction, and offers no opinion regarding whether such approval is required. *Staff Ex. 1.0* at 2.

including in the primary directory the White Pages for the entire City of Chicago (as one exchange). Id. As a condition of that variance, RHD distributed Neighborhood Directories. Id. More specifically, RHD printed and distributed to each customer in a designated neighborhood a Neighborhood Directory that included White Pages and Yellow Pages. Id. Other conditions imposed by the Commission were: 1) customers could request and receive at no charge a printed copy of the Chicago city-wide residential White Pages directory; 2) Chicago city-wide residential White Pages were available without charge on a CD-ROM; and 3) Directories were to include notice to customers of the availability of the Chicago city-wide residential White Pages directory to be delivered upon request of the customer. Id.

In this proceeding, RHD seeks significantly broader – in the Staff’s opinion, markedly overbroad – relief. Here, RHD proposes only to distribute some form of Yellow Pages directories with emergency and government listings, to all customers. Staff Ex. 1.0 at 4; Petition, ¶15. RHD proposes to cease inclusion of White Page listings in the Neighborhood Directories, and deliver the Chicago city-wide White Pages only upon specific request. Staff Ex. 1.0 at 5. Further, RHD seeks authority to extend its variance to stop distribution of directories to all customers in exchanges outside of the City of Chicago. Id. Again, residential White Pages directories would be available only upon specific request. Id.

RHD has failed to bear its burden of proof in demonstrating that: “the [requested] waiver [will] not harm consumers[.]” 220 ILCS 5/13-513, or that: [n]o party will be injured by the granting of the variance.” 83 Ill. Adm. Code 735.50(b).

Much of the evidence RHD advances in support of its request is simply recycled from its presentation in Docket No. 07-0434. Staff Ex. 1.0 at 7. There, it will be recalled, RHD was granted a waiver based upon the fact that white pages would be printed and distributed to customers, *albeit* in the Neighborhood Directory form. Id.

Indeed, a significant degree of harm will indeed result from the grant of the variance. Staff Ex. 1.0 at 7. While RHD witness David Davidson asserts that changes in the way customers obtain telephone numbers, and most specifically use of the Internet to do so, see RHD Ex. 1 at 9-10, he presents no statistical support for this proposition. Id. Further, available evidence suggests that a substantial number of Illinoisans do not or cannot use the Internet. Recent estimates from the U.S. Census Bureau indicate that as many as 20% of Illinoisans do not even own a computer. See Staff Ex. 1.0 at 7, *citing* Table B6, “Exploring the Digital Nation: Computer and Internet Use at Home”, U.S. Department of Commerce, November 2011. Certainly, discontinuing the general distribution of White Pages will cause “harm” or “injury” to that 20% of Illinoisans within the meaning of Section 13-513 or Rule 735.50(b). Simply put, RHD has the burden of demonstrating that no such harm or injury will result from the waiver, and its failure to demonstrate the lack of harm or injury is fatal to its request.

RHD states that it will continue to distribute “White Pages” directories to those customers who specifically request copies. RHD Ex. 1 at 8-9. It further states that during the period it has been delivering the Chicago citywide directory

only upon request, it has received few requests. *Id.* at 10-11. It states that other entities that publish directories have experienced a similar lack of interest on the part of customers. *Id.* at 11-12. This, suggests RHD, supports the proposition that customers do not want directories. *Id.* at 10.

However, these data points can be subject to differing interpretations. First, the existing neighborhood directories may indeed fill the needs of customer, as RHD suggested that they would in Docket No. 07-0434. See Staff Ex. 1.0 at 8, *citing* Direct Testimony of David Kelly, RHD Ex. 1.0 at 7³, *et seq.* Second, it may be that the availability of citywide directories has been inadequately publicized, despite RHD compliance with the Commission's Order in Docket No. 07-0434. *Id.* In either case, it is not clear that RHD conclusions follow from the evidence that it has submitted.

Moreover, the fact that other state Commissions, acting subject to different statutes and regulatory schemes, have granted relief similar to that which RHD seeks here, is not a compelling reason for this Commission to follow suit. This Commission is an independent body, charged with serving the interests of Illinoisans and the State of Illinois. It need not follow in lockstep the actions of some other state Commissions, especially where, as here, doing so would not serve the interests of Illinois telephone subscribers.

In addition to its failure to demonstrate that no harm or injury will result from the waiver, RHD has failed to show any undue burden resulting from the requirement that it deliver Neighborhood Directories. RHD will continue to

³ Mr. Kelly's testimony has been marked as RHD / Dex Ex. 1.2 in this proceeding.

distribute at least one Yellow Pages directory of some sort to every customer. As noted, RHD seeks to eliminate inclusion of the residential White Pages in the Neighborhood Directories. RHD receives no advertising revenue from the White Pages, but it cannot be said that incorporating it into the Neighborhood Directories is unduly burdensome, especially insofar as RHD intends to continue distribution of the Neighborhood Directories. Staff Ex. 1.0 at 8. Further, RHD's argument that ceasing to distribute residential White Pages is an environmentally sensitive act, see RHD Ex. 1.0 at 14, withstands very little scrutiny. First of all, any argument that ceasing to generally distribute some form of residential White Pages will: "result in a significant reduction in paper waste each year[,]" RHD Ex. 1.0 at 14, applies *a fortiori* to the general distribution of Yellow Pages, especially since, unlike the White Pages, customers have access to at least one product similar to the Yellow Pages. Tr. at [not yet available]. Second, RHD's argument that customers now use different methods to search for telephone numbers, such as online searches, RHD Ex. 1.0 at 9-10, is equally infirm, and for identical reasons. It scarcely warrants acknowledgment that customers can search for business information of the sort contained in the print Yellow Pages as easily – or indeed more easily, in light of the ubiquity of business information on the internet – than they can for residential phone listings. If RHD has made a case for anything in this proceeding, it is a case for discontinuing general distribution of the Yellow Pages.

V. Conclusion

In summary, RHD has failed to bear its burden of proving that the requested waiver will not harm consumers, that no party will be injured by the granting of it, or that the rule requiring general distribution of White Pages directories is unduly burdensome or unreasonable, especially in light of the significant relief that the Commission granted RHD in its Order and Amendatory Order in Docket No. 07-0434. The Commission should therefore deny the waiver and the Petition.

In the event that the Commission elects to grant the waiver, however, such waiver should be conditioned on the following:

- RHD should be required to conduct a general survey of customers within the service territory covered by each directory to determine whether consumers wish to continue to receive residential white pages as part of at least one directory distributed annually. Staff suggests a survey could be conducted using a return postage paid card included with the core directory distributed prior to RHD's intention to eliminate white pages in a specific area. The postage card would be provided in a conspicuous manner to help ensure maximum response by directory recipients. Since RHD chooses saturation distribution, the survey should be made of all recipients of the core directory. RHD would present the results of the survey when providing prior notice (120 days) to the Commission of its intent to eliminate residential white pages in a specific directory.
- The Illinois Bell Telephone Company ("AT&T Illinois") should be required to ask new customers at the time of application whether they wish to receive a directory containing residential white pages.
- The conditions imposed by the Commission in Docket No. 07-0434 should remain in effect.

Staff Ex. 2.0R at 3-4

WHEREFORE, the Staff of the Illinois Commerce Commission respectfully requests that its recommendations be adopted in their entirety consistent with the arguments set forth herein.

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Respectfully submitted,

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